In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-247

JACK SIMMONS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 497 F. 2d 177. The order of the district court (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1974. A petition for rehearing was denied on August 8, 1974. The petition for a writ of certiorari was filed on September 7, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

563-052—74——1

QUESTION PRESENTED

Whether petitioner's motion to withdraw a guilty plea was properly denied.

STATUTORY PROVISIONS AND RULES INVOLVED

The provisions of the federal peonage and involuntary servitude statutes, 18 U.S.C. 1581(a) and 1584, and of Rules 11 and 32(d) of the Federal Rules of Criminal Procedure are set forth at Pet. 3–4.

STATEMENT

1. Petitioner and his brother were separately indicted on June 15, 1972, on multiple counts of violating the federal peonage and involuntary servitude statutes, 18 U.S.C. 1581(a) and 1584 (Pet. App. A17). On November 6, 1972, petitioner's brother pleaded guilty to one count of his seven-count indictment (*ibid.*). One week later, on the scheduled date of trial, petitioner pleaded guilty to two of the fifteen counts charged against him (Pet. App. A17).[1] After thoroughly questioning him in accordance with Rule 11, Fed. R. Crim. P.,[2] the district court, in accepting

[1] Appended to this brief, as Appendices A and B, respectively, are pertinent portions of the transcripts of the hearings on November 13, 1972, at which petitioner pleaded guilty and on April 16, 1973, on his motion to withdraw that plea.

[2] Addressing him personally, the court established that petitioner was not under the influence of any drug or other impairment to his ability to think rationally; that he was satisfied with the representation of his counsel; that he understood the maximum penalty that could be imposed on each count and that the sentences could be imposed consecutively; that his decision to plead guilty was not influenced by any threats, offers of reward, or promises of lightened punishment, but was his own independ-

petitioner's guilty plea, found that it was "freely, intelligently and voluntarily made * * *" (App. A, *infra*, p. 10) and that the report of the FBI agent assigned to the case "states all the essential elements of the offense charged * * *" against him (*ibid.*).[3]

2. Petitioner and his brother appeared for sentencing on April 6, 1973. The brother was sentenced first, to four years' imprisonment (Pet. App. A18). Immediately after that sentence was imposed, petitioner's co-counsel moved to withdraw petitioner's guilty plea, stating (Pet. App. B24, n. 4):

> I felt like * * * when we entered the plea of guilty * * * that * * * [petitioner's] record would warrant probation * * * but obviously having been in Court when * * * [his brother] was just sentenced, I think I probably gave * * * [petitioner] bad advice in entering his plea of guilty to two counts.[4]

3. At a hearing on that motion, petitioner's former co-counsel testified that, just prior to the sentencing hearing, petitioner's remaining counsel had suggested

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ent decision; that he had not been intimidated in any way, either by his counsel or by the government; that he understood his plea of guilty constituted an admission of the truth of the charges against him and a waiver of his right to a jury trial; that he believed the government could establish a case against him; and that he had a complete understanding of what he was doing (App. A, *infra*, pp. 9–10).

[3] The report, which contained victims' statements, was read aloud by the agent. Following the reading, and in response to questions posed by the court, petitioner acknowledged its truth and the truth of its contents (App. A, *infra*, p. 10).

[4] Petitioner's other attorney thereupon moved to withdraw from the case, and the court granted the motion (Pet. App. B22, n. 2).

that they move to withdraw petitioner's guilty plea should it appear that he would not receive probation, but that the former counsel had opposed the idea because the plea had been voluntary (App. B, *infra*, pp. 12–13). He further testified that petitioner was able to understand the charges against him and their consequences (*id.* at 12). Petitioner's remaining counsel testified that he had recommended a guilty plea because he believed petitioner would probably get probation (*id.* at 11). The Assistant United States Attorney indicated that, in reliance on the guilty plea, the government had released its witnesses, most of whom were persons without fixed addresses, and it would probably be unable to reestablish contact with them (*id.* at 13–14).

4. In denying petitioner's motion, the district court found that the plea was "factually based and freely, intelligently, and voluntarily made" (Pet. App. A 18); that petitioner's "decision to plead guilty was based, in part, upon the advice of his privately retained counsel that a plea of guilty would probably result in a sentence of probation," which petitioner "understood * * * was based solely on counsel's private feelings" (*ibid.*); that "no promises or representations concerning sentence had been made by the Government or the Court" (*ibid.*); that the motion to withdraw the guilty plea was prompted by his counsel's conclusion, on the basis of the sentence imposed on petitioner's brother, that probation was unlikely (*ibid.*); and that there would be "probable prejudice to the Government in attempting to prepare for trial

after having discontinued contact with witnesses extremely difficult to locate" (*id.* at 19).

ARGUMENT

1. The record establishes that petitioner's guilty plea was factually based, voluntary, and intelligently made, and that the district court's acceptance of the plea comported with Rule 11, Fed. R. Crim. P.[5] Moreover, the chronology suggests that the attempted withdrawal was not motivated by any inaccuracy in the plea, but solely by the sentence imposed upon petitioner's brother, which caused counsel to fear that petitioner would receive a heavier sentence than he had anticipated. Finally, the uncontroverted statement of the prosecutor showed that allowance of the withdrawal would probably result in substantial prejudice to the government.

2. While an accused's pre-sentence motion to withdraw his guilty plea under Rule 32(d), Fed. R. Crim. P., should generally be freely granted to promote fairness and justice (*e.g., Kercheval* v. *United States,* 274 U.S. 220, 224; *United States* v. *Vallejo,* 476 F. 2d 667, 669 (C.A. 3), certiorari denied *sub nom. Miller* v. *United States,* 414 U.S. 830; *United States* v. *Vasquez-Velasco,* 471 F. 2d 294 (C.A. 9), certiorari denied, 411 U.S. 970), the courts

[5] Indeed, as the court of appeals noted, petitioner's present counsel—who also represented him at the hearing on the motion to withdraw the plea—acknowledged at that hearing that the Rule 11 proceeding was fair and thorough (Pet. App. B25, n. 5): "I might state for the record * * * we do not feel * * * that the Court could have asked any other questions that would have materially helped the situation."

of appeals have uniformly held that the right of withdrawal is not absolute but rests within the sound discretion of the trial court. *E.g., Johnson* v. *United States,* 485 F. 2d 240, 241 (C.A. 10); *United States* v. *Vallejo, supra,* 476 F. 2d at 669; *United States* v. *Vasquez-Velasco, supra,* 471 F. 2d at 294; *United States* v. *Valdez,* 450 F. 2d 1145, 1146 (C.A. 5); *United States* v. *Lombardozzi,* 436 F. 2d 878, 881 (C.A. 2), certiorari denied, 402 U.S. 908. The accused bears the burden of establishing the propriety of the withdrawal. *United States* v. *Webster,* 468 F. 2d 769, 771 (C.A. 9), certiorari denied, 410 U.S. 934; *United States* v. *Lombardozzi, supra,* 436 F. 2d at 881. The likelihood of prejudice to the government as a result of withdrawal of the plea is one factor to be considered by the trial court in its assessment of the motion. *United States* v. *Vasquez-Velasco, supra,* 471 F. 2d at 294; *United States* v. *Del Valle-Rojas,* 463 F. 2d 228, 229 (C.A. 9); *United States* v. *Lombardozzi, supra,* 436 F. 2d at 881.

3. Applying these well-settled legal principles to the facts here, the court of appeals properly concluded that the district court had not abused its discretion in refusing to allow petitioner to withdraw his plea of guilty. Indeed, the district court's ruling was particularly appropriate here in light of the clear indication that petitioner's motion to withdraw the plea was based upon nothing more than his attorney's belief that he would receive a more severe sentence than counsel had previously anticipated. See *Brady* v.

United States, 397 U.S. 742, 757; *United States* v. *Battle*, 447 F. 2d 950, 951 (C.A. 5).[6]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
J. STANLEY POTTINGER,
Assistant Attorney General.
BRIAN K. LANDSBERG,
NEAL J. TONKEN,
Attorneys.

NOVEMBER 1974.

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[6] As the court of appeals noted (Pet. App. B24): "To have granted the motion under these circumstances would have been to permit appellant to use the guilty plea as a means of testing the weight of the potential sentence—a primary policy ground for denying plea changes."

APPENDIX A

TRANSCRIPT OF NOVEMBER 13, 1972, HEARING AT WHICH PETITIONER ENTERED PLEA OF GUILTY, PAGE 3, LINE 20—PAGE 6, LINE 3; PAGE 12, LINES 13–25

The COURT. Mr. Simmons, are you under the influence at this time of any narcotics, drugs——

Mr. SIMMONS. No, sir.

The COURT [continuing]. Or anything that would impair your ability to think rationally?

Mr. SIMMONS. No, sir.

The COURT. Are you satisfied with the representation thatt counsel has given you in this matter?

Mr. SIMMONS. Yes, sir.

The COURT. With the advice that counsel has given you in connection with the consequences of a plea?

Mr. SIMMONS. Yes.

The COURT. What is the maximum penalty on each of these counts?

Mr. DEARING. Five years and $5,000, Your Honor.

The COURT. You understand that is the maximum penalty iin each count?

Mr. SIMMONS. Yes, sir.

The COURT. And that if I accept a plea of guilty, potentiallly you can receive consecutive sentences?

Mr. SIMMONS. Yes, sir.

The COURT. Up to 10 years or $10,000 fine or both?

Mr. SIMMONS. Yes, sir.

The COURT. Is your decision to plead guilty your own indlependent decision to plead guilty?

Mr. SIMMONS. Yes, sir.

The COURT. Is it in any way influenced by any threats or offers of reward or promises or hopes of lightened punishment of any kind?

Mr. SIMMONS. No, sir.

The COURT. Has anybody in any way with the Government, your own counsel or any other person intimidated you in any way?

Mr. SIMMONS. No, sir.

The COURT. To have you to plead guilty?

Mr. SIMMONS. No, sir.

The COURT. Do you understand that the plea of guilty admits the truth of the charge?

Mr. SIMMONS. Yes, sir.

The COURT. Against you?

Mr. SIMMONS. Yes, sir.

The COURT. Do you understand that if I accept a plea of guilty, that you waive the right to trial by Jury; in other words, you are not subject to Jury trial; do you understand that?

Mr. SIMMONS. Yes, sir.

The COURT. Are you satisfied that the Government can make out a case against you?

Mr. SIMMONS. Yes, sir.

The COURT. Then I take it you have a complete understanding of what you are doing?

Mr. SIMMONS. Yes, sir.

The COURT. Mr. Simmons, do you admit the truth of the report of the FBI Agent?

Mr. SIMMONS. Yes, sir.

The COURT. Do you admit the truth of what the FBI Agent has just reported? Do you admit what he says is true?

Mr. SIMMONS. Yes, sir.

The COURT. The Court finds that the plea of guilty to Count 8 and Count 9 of the indictment is freely, intelligently and voluntarily made; that the report of the investigating Agent, the truth of which is admitted by the defendant, states all the essential elements of the offense charged, and the

APPENDIX B

TRANSCRIPT OF APRIL 16, 1973, HEARING ON PETITIONER'S MOTION TO WITHDRAW GUILTY PLEA, PAGE 9, LINE 14–PAGE 10, LINE 16; PAGE 71, LINES 5–23; PAGE 80, LINE 22–PAGE 81, LINE 15; PAGE 136, LINE 11–PAGE 138, LINE 4

[Mr. HARRIETT.] I advised him to plead guilty to two counts because I felt that he would be entitled to probation on his record.

Q. [Petitioner's Counsel, Mr. Fine.] Did you represent that to him?

A. [Mr. HARRIETT.] Yes, I did.

Q. Based upon your experience of almost 25 years of practice, and familiarity with matters of probation, did you so represent?

A. Yes, sir.

The COURT. Just a minute, counsel. You can go ahead and lead him all you want to. What I want to know is exactly verbatim what was said.

Mr. FINE. Thank you, sir.

The COURT. And you can go ahead and couch it in terms in which you are, but I am going to turn right around and ask him because I want to know exactly what was said.

Mr. FINE. Certainly.

Q. Would you be good enough, please, exactly as His Honor indicates, what you did tell him about his plea?

A. Of course, I don't know that I can remember it word-for-word.

Q. I appreciate that.

A. But I can tell you that I recommended to him that he enter the plea of guilty to two counts of involuntary servitude, and I informed him that I thought he would get probation.

Q. [Assistant United States Attorney, Mr. Dearing.] Did you explain to him what each of these counts in the indictment charged him with?

A. [Mr. LILES.] Yes, I did, because there were two different offenses charged: One was involuntary servitude; the other one would be peonage. We discussed the fact that a number of individuals that were listed as witnesses, and who were listed as being the victims of the offenses were named in the counts, but not only for involuntary servitude, but for peonage, and I at that time discussed with him my desire to file a motion to compel the Government to elect which count to proceed on.

Q. During the course of your conversation from the questions he asked and the responses he gave you, was it your opinion that he understood what you were telling him?

A. Yes.

Q. Is it your opinion at that time, is it still your opinion he understood the consequences of the charges?

A. Yes.

[Mr. LILES.] Mr. Harriett, as I recall, stated to me at that time, just prior—when we went in the Courtroom, that should the defendant be sentenced, that he felt we should consider withdrawing the plea——

Q. [Mr. DEARING.] Let me stop you just a minute. Should what defendant be sentenced?

A. [Mr. LILES.] Should it appear Mr. Simmons was going to go to jail as opposed to getting probation, we felt we should consider to withdraw the plea.

Q. You mean should his brother before——

A. We didn't know in which order they were going. The statement was clearly to me if it appears that Jack Simmons is going to get sentenced to imprisonment, that he felt that he should withdraw the plea. And I at that time, in the presence of Mr. Simmons' brother's attorney told him that I did not think that was a good idea, that the plea had been voluntary, and that I thought it would be a bad move.

[Assistant United States Attorney, Mr. Dearing.] Now, I can represent to the Court, since I have been sworn, I think it should be accepted as evidence in the case that prior to the time that the plea was accepted, the Government had gone to great expense to keep in touch with the witnesses that it interviewed, the witnesses that it had taken before the Grand Jury. I personally advised many of them to stay in touch with the FBI agents, and so did Mr. Conroy, my co-counsel in the case. We had FBI agents over the country keeping in touch with these witnesses, and the witnesses were keeping in touch with whatever FBI office they were in, or whichever district they were in so they could be advised when it was time for them to come to trial.

We have gone to great expense to locate these witnesses at the time of trial and to have them here. Since Mr. Simmons entered his plea of guilty, we were relying on the fact that it was accepted by the Court, we excused these witnesses. We no longer have any idea where they are. We no longer have the ability to find them. One of them we know of is in the process of being deported and he is going to be out of the country very shortly. I think he is going to the Port of Saudi Arabia. We will have no process over him there. The Court in reliance on this guilty plea excused the witnesses. These witnesses, as

the Court knows, are all shiftless people, to speak of it very bluntly, they were found on the Bowery in New York by Mr. Simmons, most of them. They are not responsible, well-stationed people. They are people that are very difficult to locate. The Government went to great expense to locate them before, and I can represent to the Court I don't think we will be able to locate them again.

If the guilty plea is withdrawn, the Government in essence will have no opportunity to present a case because I don't think we can find these witnesses again. I am sure we can't find most of them, and it will be just a matter of sheer luck to be able to find any of these people again.

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